STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of New York on May 18, 1983

COMMISSIONERS PRESENT:

Paul L. Gioia, Chairman
Edward P. Larkin
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead, dissenting
Richard E. Schuler
Rosemary S. Pooler, dissenting

CASE 26494 - New York State Cable Television Association - Investigation of Pole Attachment and Related Agreements between Utilities and CATV Systems

ORDER DENYING PETITIONS FOR REHEARING AND PROVIDING FOR TEMPORARY RATES

(Issued May 27, 1983)

BY THE COMMISSION:

By our Opinion No. 83-4, issued January 31, 1983, we prescribed the method for determining the rates to be charged by telephone and electric utilities for the attachment of cable facilities to utility poles.[1/] Petitions asking us to reconsider various aspects of that decision have been filed by Consolidated Edison Company of New York, Inc. (Con Edison), New York Telephone Company, Rochester Telephone Corporation and its subsidiaries, Highland Telephone Company and Sylvan Lake Telephone Company (Rochester Telephone), and

1/Case 26494, New York State Cable Television Association - Opinion and Order Concerning Pole Attachment Rates.

Niagara Mohawk Power Corporation (Niagara Mohawk).[1/] Responses to the petitions have been filed by the New York State Cable Association (Association) and the New York State Commission on Cable Television (Cable Commission).

The petitions for rehearing concern our determinations on three issues in particular: (1) reference to 75% of fully allocated costs in determining the rate level; (2) the inclusion of neutral space as usable space in the calculation of the cost share for which CATV operators will be held responsible; and (3) the reliance on historical cost levels rather than prospective investments in determining pole attachment fees. Each of these issues is discussed in turn below; we then consider the compliance filings that have been made pursuant to Opinion No. 83-4.

The Measure of Pole Attachment Rates

Con Edison, Rochester Telephone, New York Telephone, and Niagara Mohawk all object to our decision to base pole attachment rates on 75% of fully allocated costs; they argue that 100% of fully allocated costs should be used. The parties assert four basic arguments in support of their position. First, Rochester Telephone and New York Telephone contend that the substantial rights vested in cable operators under the pole attachment agreements justify use of the 100% rate. Although we found the rights of CATV operators to be subordinate, they say, the two contractual obligations cited--cable operators' responsibility for pole replacement

1/Long Island Lighting Company (LILCO) also submitted a petition for rehearing, filed with us on March 22, 1983, more than 45 days after the issuance date of our Opinion. Because Section 2.8 of our Rules of Procedure requires filing "within 30 days after service of final order upon the party who files such petition," LILCO's submission is untimely, and its comments will not be considered herein.

and make ready charges--have a de minimis impact given the infrequency with which they arise.

Second, Con Edison and Niagara Mohawk decry our apparent efforts to balance the interests of cable users and utility ratepayers; according to them, the statute at issue--Section 119-a--already embodies a compromise that favors CATV operators, and the further compromise we reached in this proceeding assertedly favors cable operators far beyond the statute's requirements. Third, in a related argument, New York Telephone and Rochester Telephone contend that no basis has been shown for considering the interests of cable operators in our balancing given the failure of the Association and the Cable Commission to make any showing of economic hardship on the part of CATV operators. According to these utility parties, CATV needs no further encouragement in New York State, and any efforts to effect a compromise on pole attachment rates would unfairly disadvantage utility ratepayers.

Finally, Rochester Telephone and Con Edison suggest that our motivation in balancing the parties' positions on this issue was largely to retain current pole attachment rates, and to equalize rates in New York State with those prevailing in the rest of the nation. Rochester Telephone argues that no emphasis should be placed on maintaining the status quo considering that the status quo is based on rates arbitrarily set in the 1950's; moreover, it says, the status quo is hardly maintained in its case, where the effect of our decision is to impose a substantial rate reduction. Con Edison maintains that equalizing New York State pole attachment rates with those of the rest of the country simply ignores the higher costs of doing business in New York State.

As the Cable Commission points out in response, however, these contentions merely "express the utilities' disagreement with [our] decision," and fail to specify alleged errors of law and fact as required by Section 2.8 of our regulations. As to the merits of the petitioners' points, the Association maintains that our reference to the inferior rights of CATV operators as a basis for the 75% rate is well-supported in the record and in actual practice; that the "compromise" we effected will still leave pole attachment rates in New York State "far above the national average"; that utility interests were clearly considered in the balancing we effected given that any rate reductions will be unnoticeable to New York's utility consumers; and that the economic importance of pole attachment rates to CATV operators has been established considering the pole attachment fees exceed 20% of cable operators' pre-tax net income.

In view of the Legislature's express authorization in Section 119-a to set pole attachment rates within the range defined by incremental costs and 100% fully allocated costs, any party seeking to dissuade us from our decision to base rates on 75% fully allocated costs has a heavy burden. In our view, this burden has not been satisfied by the utilities' petitions for rehearing, which fail to show any error of law or fact in our decision, but merely decry our adoption of an opinion different from their own. The petitions for rehearing on this point are therefore denied.

Classification of Neutral Space as Usable Space

Con Edison, Rochester Telephone, New York Telephone, and Niagara Mohawk all object to our decision to include the 40 inches of neutral space separation required between electrical conductors and communication lines as usable

space. According to these parties, this decision is inconsistent with the language of Section 119-a, which they say mandates the exclusion of neutral space. Specifically, they argue that the statute draws a distinction between all space above minimum grade level and usable space; they claim that our decision, in contrast, but for the determination relating to pole tops, treats usable space and all space above minimum grade as one and the same. They refer also to Judge Matias' discussion of legislative history, and, in particular, his conclusion that the statute's failure to include references to the attachment of "associated equipment" as a determinant of usable space--as provided in the federal statute--evinces an intention to define usable space to be that space available for the attachment of horizontal wires and cables. Under this interpretation, the attachment of street lighting within the neutral space--a fact cited by us as illustrating the usability of the neutral space--would become irrelevant. According to the utility parties, only this interpretation would give meaning to the "horizontal wires and cables" language referred to by Judge Matias.

Rochester Telephone and New York Telephone also take issue with our observation that because cable operators are held responsible for one foot of usable space when in fact they occupy only about three inches of space, they must be bearing responsibility for some portion of the neutral space. In fact, say these utility parties, the 12 inches represent required clearance between the CATV attachment and the nearest communications attachment, and are unrelated to the neutral space between communications and electric wires.

The Association argues in response that the incidence of attachments in the neutral space is far greater than described by the utilities; specifically, it contends that attachments other than horizontal cables appear on 44% of all cable attached poles, with street lights appearing on 35% of cable attached poles. It also supports our conclusion that cable already bears a portion of the neutral zone by treating its three-inch attachment as occupying one foot. It submits that the one-foot separation cited by Rochester Telephone and New York Telephone is in fact not required by the National Electrical Safety Code, but reflects merely the Bell System's own engineering preference. Finally, the Association dismisses the statutory interpretation relied upon by the utility parties, describing it as inconsistent with the expert construction of the parallel federal act and similar state laws.

As shown by reference to our concluding paragraph of our discussion on this issue in Opinion No. 83-4--reproduced in the footnote below--we have already considered the arguments raised by the petitioners on rehearing, and found them unpersuasive; we see no need to examine them further in a rehearing.[1/] An aspect disregarded in particular by the

1/"First, we find little support in the record for the suggestion that particular significance should be tied to the language in Section 119-a referring to the attachment of wires and cables. Although differences between the state and federal statutes are noteworthy, in the absence of some evidence regarding the Legislature's interest in enacting the state's provision, we are unwilling to assume that the "wires and cables" referred to in the state statute were intended to restrict the usable space to areas available for horizontal wires and cables. Second, the presence of revenue-producing attachments in the neutral space, while not dispositive, nevertheless argues for including the neutral space as usable. Finally, that the parties agreed cable operators should be held responsible for one foot of usage space, when in fact cable attachments occupy only about three inches of space, suggests that some portion of neutral space is being charged to CATV. In these circumstances, where a portion of neutral space is already included in the numerator of the use ratio, it is only equitable that neutral space be included in the denominator as well, by counting it as usable area." Case 26494, supra, Opinion No. 83-4, mimeo pp. 43-44.

petitioning utilities is that we found no single factor to be dispositive on this issue, but, rather, concluded that the weight of evidence on these points argues for classifying the neutral space as usable. Although the parties may allege a tenable case as to individual points, they fall far short of showing that the record as a whole does not support our determination. Their petitions on this point accordingly are denied.

Pole Investment

New York Telephone objects to our decision to rely on historical figures for average pole costs rather than using projected data. As discussed in Opinion No. 83-4, we were concerned that the method developed in this proceeding be as self-executing as possible, and we reasoned that although "pole attachment rates may lag somewhat behind the actual investment costs" using historical data, the marginally greater accuracy afforded by the cost projections may be "outweighed by the potential for controversy and debate over estimates."[1/] New York Telephone maintains that the risk of potential controversy and debate is not borne out by the record. What the record does show, it says, is that the use of historical data will result in pole attachment fees about 5 to 10% below actual costs. It urges us to modify our Opinion and provide for the use of prospective investments and expenses in the setting of pole attachment fees, which would be consistent with our policy on forecasted test periods.

The Association points out in response that the method we approved to some extent accounts for an expected increase in investment by using higher year-end investment figures rather than the mid-year investment proposal advanced by the Association. The Association also notes, correctly,

1/Case 26494, supra, Opinion No. 83-4, mimeo p. 15.

that while we have a policy of relying on forecasted test periods in setting tariff rates for utility services, these forecasts are subject to evaluation and scrutiny by staff and intervenors in rate hearings. In the instant proceeding, on the other hand, the intent is to avoid regular hearings and to avoid our day-to-day involvement in evaluating and testing the accuracy of pole attachment rate methods.

In our view this issue involves an evaluation of competing interests--the need for greater accuracy and a closer tracking of costs versus the avoidance of controversy and debate over cost projections. We are satisfied that we effected a reasonable compromise on this point by deciding to use year-end investment data, and New York Telephone has not shown this decision to be based on any error of law or fact. Accordingly, its petition for rehearing on this point is denied.

Compliance Filings

Under the procedures set forth in Opinion No. 83-4, utilities were directed to file proposed pole attachment rates in accordance with the method prescribed in that Opinion. Twenty-six telephone companies and the seven major investor-owned electric utilities have complied by submitting proposed rates on or about April 1, 1983. Interested parties were given thirty days after the date of filing to comment upon or object to the proposed rates, and we have received objections to the rate calculations of six of the seven electric companies and three of the twenty-six telephone companies.[1/]

1/The attached Appendix lists those utilities whose rates are being challenged and the aspects of the rate filing at issue.

As for those utilities whose rate calculations are not in controversy, we see no reason for preventing the rates from taking effect on a permanent basis sixty days after their filing, as we provided in Opinion No. 83-4.[1/] With respect to the remaining six electric companies and three telephone companies listed in the Appendix, however, we believe that further investigation extending beyond the sixty-day period is necessary to determine the validity of the objections we have received. Accordingly, though we shall allow the proposed rates at issue to become effective on the sixtieth day following receipt, they shall be imposed on a temporary basis and made subject to refunds or reparations pending the outcome of our investigation of the comments and objections.[2/]

The Commission orders:

1. The petitions for rehearing of the Opinion and Order issued in Case 26494 (Opinion No. 83-4) are denied.

2. The pole attachment rates proposed by the utilities listed in the Appendix shall become effective on a temporary basis on the sixtieth day following their filing, subject to refund or reparation if they are directed to be changed in light of the objections raised against them.

3. This proceeding is continued.

By the Commission,

(SIGNED) JOHN J. KELLIHER
Secretary

1/Case 26494, supra, Opinion No. 83-4, mimeo pp. 52-53, Ordering Clause 1.

2/Although we expressed concern in Opinion No. 83-4 about permitting challenged rates to take effect on a temporary basis (see mimeo pp. 52-53), where, as here, the points of contention are relatively minor and have an insignificant impact on the level of proposed rates, we are satisfied that allowing the rates to take effect subject to refunds or reparations provides an equitable means of implementing the rate change.

Objections to Utility
Pole Attachment Rate Filings[1/]

Utility	Rate Filing Date	Effective Date	Major Point(s) of Contention
Con Edison	3/18/83	6/ 1/83	1) Method of calculating gross receipts tax and uncollectible factor. 2) Inclusion of guying and anchoring in average pole investment. 3) Method of estimating magnitude of guying and anchoring investment. 4) Application of NYT statewide pole survey.
Central Hudson	4/ 4/83	6/ 3/83	1) Method of calculating gross receipts tax factor. 2) Method of computing appurtenance investment. 3) Questions unusual charging proposal for joint poles.
Highland Telephone	4/ 1/83	5/31/83	1) Charging of different rates for solely-owned vs. jointly-owned poles.
LILCO	4/ 6/83	6/ 5/83	1) Method of calculating appurtenance investment. 2) Inclusion of guying and anchoring in average pole investment. 3) Application of NYT statewide pole survey. 4) Calculation of gross receipts tax and uncollectible factor.

1/The Association is the only party that has submitted comments or objections.

Utility	Rate Filing Date	Effective Date	Major Point(s) of Contention
NYSEG	4/ 4/83	6/ 3/83	1) Method of calculating appurtenance investment. 2) Inclusion of guying and anchoring cost in average pole investment
New York Telephone	4/ 4/83	6/ 3/83	1) Inclusion of guying and anchoring investment in average pole investment, both prospectivel and retroactively to March 18, 1980.
Niagara Mohawk	4/ 4/83	6/ 3/83	1) Method of calculating appurtenance investment 2) Inclusion of guying and anchoring cost in average pole investment
Orange & Rockland	4/ 4/83	6/ 3/83	1) Method of calculating appurtenance investment
Sylvan Lake Telephone	4/ 1/83	5/31/83	1) Charging of different rates for solely-owned vs. jointly-owned poles

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CASE 26494 - New York State Cable Television Association - Investigation of Pole Attachment and Related Agreements Between Utilities and CATV Systems - Petitions for Rehearing

Anne F. Mead and Rosemary S. Pooler, Commissioners, Dissenting:

We respectfully dissent from the majority's decision to deny rehearing in this proceeding.

Our dissenting statement in Opinion No. 83-4 describes our position concerning the level of costs to be reflected in deriving pole attachment rates. Insofar as the petitioners here echo many of our objections to the majority's decision to base pole attachment rates on 75% of fully allocated costs, it goes without saying that we believe rehearing on this point is warranted.

Of more concern to us at this stage of the proceeding is the neutral space issue, where we believe the petitions present a compelling basis for granting reconsideration of the Commission's decision to include neutral space as part of usable space. It should be noted that we did not dissent from the majority's resolution of this issue in Opinion No. 83-4; but after reviewing the petitions for rehearing on this issue, we are convinced that the Commission lost its way on this complex issue as it embarked on its "result-oriented"1/ consideration of proper pole attachment charges. Specifically, we believe the Commission erred both as a matter of law and fact in its consideration of this issue.2/

1/ Rochester Telephone Corporation's Petition, p. 9.

2/ Section 2.8 of the Commission's regulations requires parties seeking rehearing to "set forth separately each error of law and fact alleged to have been made by the Commission in its determination."

First, as a matter of law, the Commission's decision is infirm inasmuch as it fails to give any meaning to obvious differences in language between the State and Federal statutes. As New York Telephone points out, in construing a State statute enacted as a consequence of a Federal statute, the failure of the State Legislature to conform to the Federal act must be considered.1/ In contrast to the Federal statute, which defines "usuable space" as the "space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment," the statute at issue here defines "usable space" as "the space ... above the minimum grade level which can be used for the attachment of wires or cables." Although Opinion No. 83-4 concludes that the difference is "noteworthy" and not much more, and the majority's Order on Rehearing cites this conclusion as dispositive of the issue here, we believe the difference between the State and Federal statutes is more than "noteworthy". By excluding the words "and associated equipment" from the State statute, the Legislature clearly intended the term "wires and cables" to refer only to horizontally run wires and cables, which renders the calculation of usable space unaffected by the presence of streetlight attachments. We doubt that the majority's disregard of the legislative history and rules of construction will withstand the legal scrutiny that its decision no doubt will receive.

Second, the Commission also based its neutral space decision on CATV's actual use of only three inches of pole space as contrasted

1/ See Theurer v. Trustees of Columbia University, 59 A.D. 2d 196, 398 NYS 2d 908(Third Dept. 1977).

with the twelve inches with which CATV operators are charged. According to Opinion No. 83-4, because a portion of the neutral space presumably is included in the numerator of the use ratio, "it is only equitable that neutral space be included in the denominator as well, by counting it as usable area."1/ As a factual matter, however, this reasoning is erroneous. The twelve inches of space cited by the Commission does not reflect the inclusion of any portion of the 40-inch neutral space required by the National Electrical Safety Code; it represents the pole clearance required between the CATV attachment and the nearest communications attachment, and thus exists independently of the 40-inch separation requirement between CATV attachments and power facilities at issue here. Neutral space is therefore not included in the numerator of the use ratio, and should be excluded as well from usable space in the denominator.

For these reasons, and for the additional bases described in our dissent to Opinion No. 83-4, we would grant the petitions for rehearing.

1/ Opinion No. 83-4, mimeo p. 44.